

DEC 16 2004 5:31

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BARBARA TOOMER, et al.,

Plaintiffs,

vs.

CITY CAB COMPANY, INC., et al.,

Defendants.

MEMORANDUM DECISION AND
ORDER

Case No. 2:04CV397DAK

This matter is before the court on Defendants' Motion for Summary Judgment. The court held oral arguments on the motion on December 15, 2004. Plaintiffs were represented by Tracy Scott Cowdell, and Defendants were represented by Donald J. Winder. The court took the motion under advisement. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties. The court has further considered the law and facts relevant to Defendants' motion. Now being fully advised, the court enters the following Memorandum Decision and Order.

BACKGROUND

Plaintiff Barbara Toomer and individuals represented by Plaintiff Disabled Rights Action Committee (collectively, "Plaintiffs") require the use of a motorized wheelchair for mobility and desire access to taxi service in Salt Lake City, Utah. Plaintiffs Complaint against the defendant cab companies alleges that the Defendants have engaged in discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12184(b) by: (1) refusing to make

33

reasonable modifications in policies, practices, or procedures; (2) failing to provide vans that are readily accessible by individuals with disabilities; and (3) failing to provide alternative methods of transportation that are readily achievable.

DISCUSSION

Defendants argue that they are not required under the ADA or the implementing regulations to provide accessible vans for wheelchair-bound persons because they do not utilize “new” vans in their fleets. Under the ADA, 42 U.S.C. § 12184(b) discrimination includes:

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 persons, including the driver, or an over-the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public.

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public.

Upon enactment of the ADA, regulations were drafted to implement the transportation provisions of the ADA. Under the regulations, a taxi service is subject to the requirements that apply to entities primarily engaged in the business of providing a demand responsive transportation service. 49 C.F.R. § 37.29(a). Pursuant to 49 C.F.R. § 37.29(b), a “taxi service is

not required to purchase vehicles other than automobiles in order to have a number of accessible vehicles in its fleet.” *Id.* § 37.29(b). If a taxicab company utilizes a vehicle other than an automobile, i.e. a van or bus, that van or bus is required to be accessible if it is “new.” 49 C.F.R. § 37.103(c). The regulations define “new” as a vehicle which is offered for sale or lease after manufacture without any prior use. 49 C.F.R. § 37.3.

Each of the defendant cab companies have submitted an affidavit stating that they do not have “new” vans in their fleets. Defendants do not buy new vehicles because the fare regulation imposed by Salt Lake City makes them cost prohibitive. Therefore, even though the companies have vans that have been purchased since the enactment of the ADA, none of those vans are “new” as that term is defined in the controlling regulations.

Plaintiffs argue that this court need not give deference to the agency that implemented these regulations and the court should apply its own definition of “new.” Namely, Plaintiffs assert that the term “new” should be defined as any van purchased after the enactment of the ADA. Although Plaintiff claims that the agency is not entitled to *Chevron* deference for its definition of “new,” the court disagrees. The agency is entitled to deference in defining terms used in the ADA that the ADA itself did not define. Even when congressional delegation to an agency on a particular question is implicit, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the agency. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782 (1984). Plaintiffs contend that the general nondiscrimination obligations in the ADA should be construed to mitigate the so-called “oddity” created in the statute based on the agency’s definition of “new.” However, for the court to adopt Plaintiffs’ position, the court would have to re-write the regulations. The

interpretation and definition provided by the agency is not unreasonable. In fact, the agency's definition of "new" is supported by the language of the ADA. In the ADA, Congress employed language with respect to solicitation that was made thirty days after the effective date of the ADA but did not employ similar language with respect to the term "new." The Court agrees with Defendants that this language indicates that the term "new" was not intended to mean any van purchased after the effective date of the ADA. Rather, "new" was used as that word is most commonly used, which is to mean without prior use. The agency employed the plain language meaning of the word "new." It would not be appropriate for this court to substitute its own interpretation. It is needless to cast a shadow of uncertainty as to taxi services' obligations under the ADA when those obligations have been made clear by the agency.

Plaintiffs claim that although Defendants state that they buy used vans only because of cost matters, the ADA precludes an administrative method that has a discriminatory effect, regardless of whether there was a discriminatory motive. However, this argument ignores the specific provisions of the ADA that regulate the taxi cab industry. Even though the general intent of the ADA is to be a remedial statute, Congress has already made the policy determinations applicable to the taxi cab industry. Therefore, this court must apply the provisions specific to these Defendants.

Plaintiffs further argue that Defendants' motion for summary judgment ignores the scope of Plaintiffs' Complaint. Plaintiffs claim the Complaint also alleges violations of the ADA for refusing to make reasonable modifications in policies, practices, or procedures, and failing to provide alternative methods of transportation that are readily achievable. However, again, the court concludes that Defendants are not violating the provisions of the ADA applicable to their

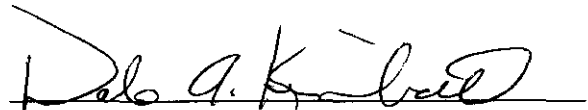
industry. Therefore, the court cannot conclude that the ADA imposes additional obligations on Defendants. Based on the language of the ADA and its implementing regulations, the court concludes that Defendants are entitled to judgment in their favor on all of Plaintiffs' claims. Accordingly, Defendants' Motion for Summary Judgment is granted, and Plaintiffs' Complaint is dismissed.

CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment is GRANTED, and Plaintiffs' Complaint is DISMISSED, each party to bear her or its own costs.

DATED this 10th day of January, 2005.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Dale A. Kimball", is written over a horizontal line.

DALE A. KIMBALL,
United States District Judge

blk

United States District Court
for the
District of Utah
January 11, 2005

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00397

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Tracy Scott Cowdell, Esq.
ARMKNECHT & COWDELL PC
32 E MAIN ST
SANDY, UT 84070
EMAIL

Mr. Donald J Winder, Esq.
WINDER & HASLAM
175 W 200 S STE 4000
PO BOX 2668
SALT LAKE CITY, UT 84101
EMAIL